BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The judgment of the District Court of the United States for the Middle District of Pennsylvania was entered June 19, 1945, and is not reported. The Opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 348) affirming the judgment of the lower court is dated January 22, 1946, and is not reported.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C., Section 347 (a), as amended by the Act of February 13, 1925, 43 Stat. 938.

Statement of the Case.

Petitioner seeks a review of the judgment of the United States Circuit Court of Appeals for the Third Circuit, filed January 22, 1946, affirming the judgment of the District Court of the United States for the Middle District of Pennsylvania, entered June 19, 1945, after a trial before Honorable William F. Smith, from the district of New Jersey specially presiding.

The facts have been set forth in the foregoing Petition and will not be repeated.

Specifications of Errors Urged.

The United States Circuit Court of Appeals for the Third Circuit erred:

1. In failing to hold that the constitutional rights of the Petitioner to a fair trial was denied by the action of the trial judge in removing from the jury panel, on his own motion, or on request of the Government, jurors regarded as favorable to the defense.

2. In failing to hold that the foregoing action of the trial judge with respect to the jury panel violates the statutes of the United States with reference to challenges.

3. In failing to hold that the conduct of the trial judge was prejudicial to such an extent as to deny the Petitioner the right of a fair trial in accordance with his rights under the 5th and 6th amendments to the Constitution of the United States.

4. In failing to hold that it was error on the part of the trial judge to refuse to permit Petitioner's attorney to examine stenographic notes used by a government witness to refresh his recollection on subject-matter concerning which he testified (359a; Assignment 821a).

5. In failing to hold that it was prejudicial error for the trial judge to deny a motion for continuance where the books and records of the Petitioner were taken from him by the Government eight months previously and returned to him only ten days before the trial.

ARGUMENT.

1. The jury panel was improperly trimmed by the trial judge.

The jury panel, summoned for use in the trial of this case, contained 47 jurors. The names of them appear in the office of the clerk of the trial court. They appear only in part from the stenographic notes of this trial.

Beginning on page 27a, it appears that 3 of the jurors were excused at their own request. From the clerk's office, it appears that altogether 15 jurors were excused. An investigation, partially completed by the Petitioner by a personal interview, shows some of them were excused without request. It has not been possible to contact all of them. Beginning on page 26a of the Record, a partial record of what took place is given. The Record states (26a):

> "At the opening of the trial the presiding Judge excused a number of prospective jurors. The Trial Judge excused additional jurors who had not made any request therefor as appears by the following, which was excepted to by the attorney for the defendant:
>
> 'Now, are there any further excuses?
>
> MR. COAR:—If Your Honor please, may I inquire if these jurors are excused on their own applications for excuse with the exception of Robert Hull?
>
> THE COURT:—Some of them on their own application some because of obvious physical disability. Some have heart trouble and a woman here has had a stroke. One man here is suffering because of impaired hearing and the like. I don't think any of those people would make competent jurors in a case that may last several days.
>
> MR. COAR:—May we have made part of the record, your Honor, the names of those jurors, who are excused on their own application.
>
> THE COURT:—No, the right to excuse jurors is within the discretion of the Court. The right of the defendant is to exclude jurors, not the right to select them. This is in the discretion of the Court, because on the information I have it is my judgment that these jurors because of matters that have come to my attention would not be competent jurors. Now, I don't intend to put forth in this record those reasons,

because it has nothing to do with this case. This applies not only to this case, but to any other case that is to follow. There is one juror I have excused, who is past beyond the age that I would consider a person for jury duty'."

It is respectfully submitted that the position of the trial judge is error. The rights of the parties are prescribed by law, and each party is given a number of challenges. The statutes involved are as follows:

Act of March 3, 1911, c. 231, Section 287; 26 Stat. 1166; 28 U. S. C. 424;
Act of June 29, 1932, c. 309; 47 Stat. 380; 28 U. S. C. 417a,

The total challenges thus afforded for the selection of a jury of 12 plus 2 alternates is 19. It is submitted that while the court may have the discretion of excusing jurors, he is not entitled to excuse them for no apparent reason or to excuse them for reasons favorable to the prosecution.

The probabilities are that the prosecution investigated the jury panel, as it had the right to do, and reported the result of this investigation to the court. There were on the panel several jurors who had just concluded the trial of a case in which Petitioner's attorney was also counsel, for another person. That trial resulted in a disagreement. It was because Petitioner's counsel was engaged in that other trial, that he asked for a continuance of this case. The prosecution opposed the continuance on the ground that that other case had resulted in a mistrial and was, therefore, concluded. This appears at page 25a, which is an affidavit suplied by the prosecution in opposition to the Motion for Continuance.

It does not appear of record, but it was a fact in that case that 4 of the jurors voted for acquittal. Some of

the jurors excused by the court without request were among those who voted for an acquittal in that other case. The names of two of them are Mrs. Maude C. Miller and B. J. Biesecker, whose affidavits are attached to this Petition. Efforts are being made to secure other affidavits, and to the extent obtained will be attached to this Petition.

It is respectfully submitted that the indications are strong to the effect that the action of the trial judge was not based on his own personal information, but on the investigation of the prosecution. The exclusion of any group of persons who might be favorable to a defendant in a prosecution, it is submitted, is not proper on the part of the trial judge. The purpose of allowing 19 peremptory challenges and beyond that challenges for cause, is in order to afford the parties a fair opportunity of selecting a jury. A jury ought not be drawn exclusively from persons known to be favorable to the prosecution.

Glasser v. United States, 315 U. S. 60 (1941).

In this case, several persons were convicted of conspiracy to defraud the United States. The conviction was sustained, and on certiorari was considered by this Court. The facts are disclosed by the following quotation from the Opinion of Mr. Justice Murphy at page 83:

> "Glasser sworn on information and belief that all the names of women placed in the box from which the panel was drawn were taken from a list furnished the clerk of the court by the Illinois League of Women Voters, and prepared exclusively from its membership, that the women on that list had attended 'jury classes whose lecturers presented the views of the prosecution,' and that women not members of the League, but otherwise qualified, were

systematically excluded, by reason of which affiant 'did not have a trial by a jury free from bias, prejudice, and prior instructions, and as a result thereof the jury was disqualified and this affiant's rights were prejudiced in that he was deprived of a trial by jury guaranteed to him by the laws and the constitution of the United States of America, and particularly the 5th and 6th amendment, all of which he offers to prove.' "

At page 86, Mr. Justice Murphy states:

"The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial."

The conviction was affirmed, but only for lack of proof of the allegations.

The Petitioner has obtained from the clerk of court the names of all the jurors on the panel and has the names of those who were excused without cause. These he offers to produce and prove. It is respectfully submitted that the action of the trial judge in arbitrarily reducing the jury panel deprived the Petitioner of a fair trial under the statutes prescribing the number of challenges to each party and also under the 5th and 6th amendments to the Constitution of the United States.

The case at bar is part of a general investigation of Judge Johnson which has caused a great deal of public interest. It is submitted that the rights of persons incidental to the main object of the Government's attack should not be sacrificed, no matter how laudable that main object may be. It is submitted that the Petitioner in this case should not be prejudiced in any way because

he may have made the path of the Government more difficult by declining to testify that some of the funds in his possession went to Judge Johnson (185a).

It is further submitted that nothing but a new trial can cure the abuses of the trial court.

2. The trial court conducted himself in the presence of the jury greatly to the prejudice of your Petitioner.

Throughout the trial of this case, the trial court was at least as vigorous in going after the Petitioner as was counsel for the prosecution. Again and again the court berated the attorney for the Petitioner. Mr. Coar, who tried the defense, is an eminent trial attorney of Scranton, with many years' experience and a fine reputation. In spite of repeated provocation from the bench, his manner was always most courteous to the court. This attitude was not reciprocated. On many instances, abuse and ridicule was heaped upon Petitioner's case and his attorney by the court. The following examples of this are taken from the records at the places indicated.

At page 208a referring to Government's Exhibit G-44, the court stated:

> "THE COURT:—No objection seems to be addressed to me. It is a private fight. I don't get into private fights."

At pages 216a-217a; with reference to the appointment of Mr. Maloney:

"THE COURT:—Let us not be technical about it. I don't think it makes an awful lot of difference who appointed him. Mr. Crolly was the Special Master and he thinks Judge Johnson made the appointment. Well, it is not unlikely to think so, because I assume it was in this court and Judge Johnson was the judge. So I suppose any appointment would have to be approved by the Judge.

MR. COAR:—Approved, yes, your Honor, I understand.

THE COURT:—What difference does it make who made it?

MR. COAR:—It may affect the credibility of this witness, your Honor.

THE COURT:—Ridiculous. He said Crolly was Special Master, through Jacob Greenes' influence he thinks he got the appointment. Crolly might have helped and he thinks the appointment was approved by Judge Johnson. How in the world——

MR. COAR:—Now, one question if I may on that subject.

THE COURT:—Go ahead:"

At pages 220a-221a the following occurred:

"MR. COAR:—If your Honor please, I submit that I am entitled to a yes or no answer.

THE COURT:—I submit that you are not. I submit that the witness will answer your question truthfully as he sees the truth, not as you hope to get it.

MR. COAR:—If the Court please, I do not think—

THE COURT:—Quiet.

MR. COAR:—May I——

THE COURT:—Quiet.

MR. COAR:—May I put an objection?

THE COURT:—Quiet. I have ruled. The witness will answer the question truthfully as he sees the

truth. He is the man who is under oath. The witness is instructed to answer the question. You may have an exception to the Court's ruling.

(Which exception is hereby allowed and sealed accordingly.)

Sealed.....U. S. D. J.

MR. COAR:—May I have an objection on the record to your Honor's statement?

THE COURT:—Yes."

At pages 239a-240a is found the trial judge's interference with the cross examination of Mr. Maloney:

"Q. E. J. Maloney & Company had a check made out to it?

THE COURT:—Yes, but you see he didn't get it. There is a difference, Mr. Coar, between having a check made out to you and getting it.

MR. COAR:—He got the check, your Honor.

THE COURT:—He did?

MR. COAR:—He had it in his hands and he endorsed it.

THE COURT:—The only testimony before this Court at this time is that Mr. Maloney received a check; that he saw a check in Mr. Memolo's office which he endorsed; that it was immediately taken from his possession by a Mr. Fear and that he then received $1200 in cash and never saw the check again. That is not getting a check in my judgment.

MR. COAR:—That isn't getting the proceeds.

THE COURT:—He just had a look at it.

MR. COAR:—No, your Honor, that is not getting the proceeds of it certainly.

THE COURT:—That is not even getting a check. That is the testimony at the moment. Now, I don't know what proof you are prepared to offer, but at the moment that is the testimony. He got a look at a check for $31,000."

At pages 240a-242a:

"Q. And you knew what you were doing when you signed it? (Blank check)

THE COURT:—But Mr. Coar, he is not on trial.

MR. COAR:—Of course he isn't.

THE COURT:—There is no assumption that he did not know what he was doing. It is difficult to believe that a man parted with close to $30,000 without knowing what he was doing, but he says then and there he saw a check for $31,075. He endorsed it, parted with it forthwith; that there was then given to him a check made out, a counter check, I think it was——

MR. COAR:—That is what he called it.

THE COURT:—And he signed it. From that day to this, he hasn't seen either the check or the money, is that it?

THE WITNESS:—That's correct.

THE COURT:—Except the $1200 in cash which was given to you?

THE WITNESS:—That's correct, your Honor.

THE COURT:—And $3000 and some odd dollars which was given in 1939 to pay a tax.

THE WITNESS:—That's correct.

THE COURT:—Let's go on.

By MR. COAR:

Q. So, Mr. Maloney, when you were asked to endorse that check you knew, did you not, that the proceeds of it were going to somebody besides yourself?

A. I did not know anything of the sort.

Q. You knew that the proceeds were not going to you, did you not?

A. I had a suspicion to that effect.

Q. Well, when you signed a check (laughter in court room).

THE COURT:—Later events confirmed it, I suppose."

At page 243a:

"Q. When was it understood?

A. When I was employed to work for the Bethlehem or Williamsport Wire Works. There is always the assumption that I was to be paid.

Q. Now, Mr. Maloney, I am not talking about assumptions——

THE COURT:—He hoped for the best but suspected the worst, as I understand his testimony.

MR. COAR:—If the Court please——

THE COURT:—Without any understanding.

MR. COAR:—I would like to find out if there was an understanding.

THE COURT:—Well, he says, 'No'. He said that there was no understanding."

At pages 244a-246a:

"Q. Did you ask Mr. Memolo, 'How about fees' for you and the men whom you had employed?

A. I did not.

Q. You were not interested in that?

A. I certainly was.

Q. Why didn't you ask about it?

A. (There is no response.)

THE COURT:—Well, Mr. Coar.

MR. CAMPBELL:—Just a moment.

THE COURT:—Now, just a moment. I don't know whether it is your memory that is bad or mine. My recollection of his testimony was simply this: As he said just now, Mr. Memolo opened the subject, by a question something in this substance, 'Mr. Maloney, if you had done this for an ordinary client, what would be your fee?' Mr. Maloney then answered, 'About $900'. In response to that, Mr. Memolo then reached down into a drawer of his desk, and some such place, and gave Mr. Maloney a roll of bills. He said, 'I think this will take care of it'.

Mr. Maloney then counted the bills and found he was the fortunate recipient of $1200.

Now I think that was the substance of the testimony. Now he didn't ask, because as he has testified yesterday, and he tells you now, in answer to the preceding question, Mr. Memolo opened the subject. Then you say to him, 'Why didn't you ask?'

MR. COAR:—Why, certainly, are we in cross examination to be limited to testimony which this witness gave on direct?

THE COURT:—Well, Mr. Coar, I have tried to be very patient. You are trying at times, because it is repetitious and repetitious and repetitious. Now, I want to allow you the widest latitude, but I surely don't want this jury and myself, at least, to sit here through the summer. Now on cross examination I am inclined to allow you the widest latitude, but not to the extent of having the same questions asked again and again. The question has been answered six times this morning. Now let's go on. Now, Mr. Coar wants to know why you didn't ask him about the fees, Mr. Maloney. Mr. Coar asked you why you didn't ask Memolo about the fees. Answer once again. Let it be the last time.

THE WITNESS:—Mr. Memolo raised the subject there when he asked me what I ordinarily would charge and I think I underestimated the amount. Perhaps, if I had asked for a larger amount, I would have received it.

THE COURT:—All right."

At pages 248a-249a:

"Q. When you put your endorsement on the check, was there anything to prevent you from putting the words 'for deposit' above your signature?

MR. CAMPBELL:—That is objected to as argumentative, if the Court please.

MR. COAR:—No, I submit that is not argumentative, if your Honor please.

THE COURT:—We are not trying Mr. Maloney, Mr. Maloney said he did not get a dollar of it, outside of the $1200 put in his hands and the amount to pay the income taxes. I do not care about Mr. Maloney's lack of judgment. We are not trying Maloney. I think he used terrible judgment. What difference does it make? The fact is—you may be able to refute it; I do not know—but the testimony at this stage is that the money did not come to him but went to Mr. Memolo, and it is this money that the Government contends actually increased Mr. Memolo's income for the year 1938 by the sum of approximately $30,000.

MR. COAR:—If the Court please, there is no evidence in this record yet that this money came to Mr. Memolo. I think your Honor is in error there.

THE COURT:—There is what?

MR. COAR:—There is no testimony yet that this money came to Mr. Memolo. The testimony of this witness is that he delivered the check.

THE COURT:—Surely there is no testimony that a gremlin walked away with it, either."

At pages 283a-284a:

"MR. COAR:—If the Court please, I move to strike his answer from the record in which he says he assumed that this came from Mr. Memolo's office.

THE COURT:—No. I will let it remain, because he only uses that for this purpose, having assumed that it came from there, he called Mr. Memolo rather than Mr. Maloney. That did not make it the fact that it came from Mr. Memolo's office. But under all the circumstances here the jury surely would have a right to infer what occurred. Just to recount briefly: Two days prior Mr. Fear brought to Mr. Memolo's office, a most unusual transaction for the bank and they opened

a bank account in the name of a man by the name of Maloney. He goes back and he opens the account. Two days later the bank gets a check signed by a Mr. Maloney. A messenger delivers it. Mr. Fear comes into possession of this check and he does not know the messenger, and with a proper caution before delivering this large sum in cash, he calls Mr. Memolo. Mr. Memolo does not say to Mr. Fear that he does not know who the messenger is or anything about it. Mr. Memolo assures him that it is all right. The jury may or may not, as it sees fit, infer from that that the check came from Mr. Memolo's office. That, coupled with Mr. Maloney's testimony that he left that same counter check in Mr. Memolo's office. I mean, you cannot isolate a circumstance and say it does not apply. But considering all the circumstances together, there is sufficient in my judgment, and the jurors are not bound by this, to infer the fact that the check came from Mr. Memolo's office. Where else, at the moment I do not know. I will let it stand. Let us go on."

At pages 349a-351a (Direct Examination of William J. Wade):

"Q. Did he produce any other books, records at that time?

A. With the duplicate deposit slips he also brought the bank statements that were copies of the ledger sheets from the bank; that is what they amount to.

* * * * * * *

MR. COAR:—We ask to have that stricken out; that latter part.

THE COURT:—You see it makes no difference.

MR. COAR:—Well, it makes this difference.

THE COURT:—Oh, Mr. Coar——

MR. COAR:—Now, Mr. Wade——

THE COURT:—Now, Mr. Coar.

MR. COAR:—Yes, your Honor.

THE COURT:—I took the time the other day to point out to you in the first instance the statute which is binding upon the Court as to the admission of all documents. Notwithstanding that I had this wholesale meaningless objection to every document that went into evidence. Now I realize that you have a client, whose rights are to be protected, but I realize, too, that there is a duty to the Court, a duty imposed upon members of the Bar, not to attempt to impede the trial by meaningless objections.

Now there are three words on the end of a sentence. They mean absolutely nothing to anybody. Yet we encumber the record by a motion to strike.

They may be stricken.

MR. COAR:—Now, if the Court please, may I say something?

THE COURT:—Yes.

MR. COAR:—Objections are made here on the theory of this case by counsel not because they are meaningless, your Honor, and I don't want this jury to get the impression that your Honor says that these are absolutely meaningless objections.

THE COURT:—Many of these objections are absolutely meaningless because I pointed out to you the statute which makes any record admissible in these proceedings and yet I have this objection that they are incompetent, that they are irrelevant, that they are immaterial. Now I say that objection becomes meaningless to me as a lawyer. I have ruled on it time and time again. There are now sixty some exhibits in evidence. You have an objection on the record to every one but four. Let's go on, please. I don't want to curtail you if you think it necessary but I can't picture in my mind——

MR. COAR:—Well, of course, your Honor please——

THE COURT:—objections of that degree are necessary. I have tried cases for fifteen years. I have sat on the bench for five. I have never had the experience I have had in this case. Now, let's go on.

MR. COAR:—If the Court please, were I not to take those objections that these were improperly admitted, then I would not be doing the thing that I ought to do and my only statement that I want to make now is if these records were brought by Mr. Memolo, this defendant, to the office and they were handed over to Mr. Wade, he can state what the records are, not what they amounted to. That is my only point."

At pages 379a-380a:

"By MR. COAR:

Q. Mr. Wade, the paper that you have just taken from your brief case——

THE COURT:—D-2 for identification.

Q. (Continuing):—is not your work, is it?

A. No, sir.

Q. Is that in connection with the 1938 receipts or 1939?

A. 1938.

Q. Do you likewise have one—not your work—for the year 1939?

A. No, sir.

Q. There was one for 1939 and there was one for 1938?

A. That's right.

Q. That you saw in your office?

THE COURT:—No. You see, Mr. Coar, it is unbelievable, but you do not remember his testimony a few minutes ago. He saw the 1938 in Mr. Naftulin's possession. He saw the 1939 in Mr. Memolo's possession in his office.

Is that right?

THE WITNESS:—That's correct.

THE COURT:—And since he saw the 1939 in Mr. Memolo's office he has not seen it since. That is my recollection of his testimony; not that he saw both in his office.

Go on."

At pages 381a-382a:

"Q. Aside from what Naftulin may have told you about that paper, do you know of your own knowledge why it was not returned to Mr. Memolo's office?

A. Yes.

Q. Can you tell us? This is of your own knowledge now, so we won't trespass on the ruling of the Court. If you cannot completely of your own knowledge, say so, please.

A. Well, I can't completely of my own knowledge.

THE COURT:—Do the best you can. Mr. Coar insists on this answer no matter how you got it. So even if it is town gossip that you got on the street corner, let us have it."

At pages 384a-385a:

"Q. Did Mr. Memolo tell you at that time that he wanted to pay the tax according to your determination?

A. Yes; he said he wanted to pay the tax.

Q. Did he not tell you why he wanted to pay the tax?

THE COURT:—You mean he is doing the Government a favor?

MR. COAR:—No, your Honor.

THE COURT:—We all want to pay, because the law says we should.

MR. COAR:—Understand that, your Honor.

THE COURT:—You mean he had a special reason for wanting to pay?

MR. COAR:—Yes.

THE COURT:—All right.

Did he tell you why?

THE WITNESS:—I think he said that he wanted to get the whole thing cleaned up."

At pages 491a-492a (cross examination of Barnet Naftulin):

"Q. My question is, did he not ask you a number of times, Mr. Naftulin, during the period of your investigation? Did he not ask you?

A. He did ask me; yes, sir.

Q. A number of times to tell him what the tax was so that he could pay it?

A. I wouldn't say—well, more than once, I would say.

Q. More than once?

THE COURT:—Mr. Coar, the duty and the obligation in the first instance is on the taxpayer. The Government has never sent me a bill. I walk in on March 15th with my income tax return and I pay it. They do not send me bills. The duty and the obligation in the first instance is on the taxpayer. Now, if he made such a request, any taxpayer, would your department at any time, with anyone, comply with any such request?

THE WITNESS:—No, he would get a complete report sometime later after the thing had gone through all the proper procedures until it reached the final computations.

THE COURT:—He would still be required to file his return?

THE WITNESS:—Yes, sir."

At page 494a:

"Q. Did you, Mr. Naftulin, make any charge of fraud or evasion against Mr. Memolo in the course of your investigation?

THE COURT:—What do you think this indictment arose out of?

MR. COAR:—I am asking this witness, if the Court please, what he did.

MR. CAMPBELL:—I think it is immaterial.

THE COURT:—No; I will let this witness answer.

By THE COURT:

Q. Did you ever charge him with fraud?

A. I didn't charge Mr. Memolo with fraud. I had nothing to do with that except—may I explain that?

Q. Yes. Explain it all.

A. This investigation had the possible indications of fraud, and therefore, it was my duty to discuss with Mr. Brownell, who was our group chief. That's as far as my duties are concerned. Then the Office decides the next procedure."

At pages 495a-496a:

"By MR. COAR:

Q. Then after Mr. Wade was assigned, you both worked on it and made your report back, and if any charge other than by way of indictment of fraud or evasion was made against Mr. Memolo, you would know about it, would you not, and you would get copies of any such information?

THE COURT:—You see, Mr. Coar, I sit here knowing full well what the procedure is and I hear you ask these very silly questions, and here is a man who, in the first instance, as he indicates to you, he makes a routine examination. There are signs which indicate to him, as he tells us in other ways, a possibility of fraud. He reports it to his group chief. His group chief requests the special agent of another department who usually investigates frauds and evasions cases,

both criminally and civilly. He enters the picture. The report is then made and goes back to the Internal Revenue Department. Is that right?

THE WITNESS:—Yes, sir.

THE COURT:—And from there it goes, if criminal prosecution is to result, to the Office of the Attorney General of the United States. Is that right?

THE WITNESS:—I believe so.

THE COURT:—You believe so? You do not know it that far?

THE WITNESS:—I do not know it that far.

THE COURT:—You see, it is not important whether or not he ever made a charge of fraud.

MR. COAR:—If the Court please, I submit that the questions that I submitted to this witness were not silly in view of the fact that he commenced an investigation in October of 1939 and there was no indictment found until March of 1945, and I would like to have this jury understand what took place in the meantime if I can get it——

THE COURT:—Mr. Wade did not enter the picture until 1941.

MR. COAR:—November, 1941, and he concluded his entire investigation, as did this witness testify, in 1943.

THE COURT:—But that does not change the situation. If they waited two years, three years, or five. They could wait six years under the Statute if they wanted to. The Statute of Limitations is six years in a case like this. I do not see what difference it makes. Do you want anything further from his witness?

MR. COAR:—No, your Honor."

At pages 497a-498a (relative to dismissal of jurors):

"THE COURT:— * * *

Now, so you may understand, at this stage of the proceedings usually the defense has a number of

motions to make. They have to be heard first, and I suppose counsel want a little time for that. There is no use in keeping you sitting around waiting for them to do that. I will have to stand that alone. Up until now I have had you to bear with me. All right; about 1:30 will be time enough. You may retire.

(Jury retired.)"

At pages 515a-516a, the Trial Judge interrupted the direct examination of the defendant and proceeded to cross examine him as to arrangements made with Greenes relative to the payment of money to him.

At pages 521a-522a, the Trial Judge again interrupted the direct examination of the defendant and proceeded to cross examine him relative to the money which the defendant alleged he had given to Mr. Decker, as follows:

"By The Court:

Q. How much of the fee did you give him in 1938?

A. 1938 I didn't give him any.

Q. None in 1938?

A. None in 1938. The money was not touched. It was left intact until 1939.

Q. You gave him $30,000 in 1939?

A. No, sir.

Q. When did you give it to him?

A. 1940 or 1941, I said. '40 or '41.

Q. You held it all until 1941?

A. That's right.

Q. Keeping it safe for Mr. Decker?

A. No; kept it in a safety deposit box until we could iron out our differences. We had some differences where he wanted more than I thought he was entitled to receive.

Q. It took you two years to iron out those differences?

A. I don't think it was two years. I can't tell you. It was either '40 or '41; I'm not able to say. It might have been '40.

Q. In 1938 you got a check from Bethlehem Steel, did you not?

A. That's right.

Q. And you gave him no part of that?

A. That's right. Neither did I take any part of it.

Q. But you had it in your safe deposit box, not in Mr. Decker's?

A. I did not.

Q. Where did you have it?

A. It was in the Chase National Bank.

Q. But in your account?

A. That's right.

Q. In 1939 you got a check?

A. Yes, sir.

Q. That likewise went into your account and not Mr. Decker's?

A. That's right.

Q. Then in 1941 you got around to paying Mr. Decker $30,000?

A. That's right.

Q. But of course, in the meantime this all rested in your account, I suppose?

A. Yes, sir.

THE COURT:—Go on, Mr. Coar."

At pages 523a-524a appears the following:

"By MR. COAR:

Q. In your two accounts, business account and attorney account in 1938, it has been testified that there were currency or cash deposits, specifically, on July 30, 1938 there was a deposit of $1,000 in the business account. It has been testified here by Mr.

Naftulin that you told him that money came from sock or from the safe deposit box. Isn't that a fact?

MR. CAMPBELL:—Just a minute. I am going to object, if the Court please, as not the best evidence. I think the records are the best evidence as to that.

MR. COAR:—As to what, Mr. Campbell?

MR. CAMPBELL:—He is asking what the records show.

THE COURT:—I have not seen anything like a record so far.

MR. COAR:—I have asked him if he told Mr. Naftulin something, your Honor.

THE COURT:—Yes; I understand what you asked him. He may answer whether or not he told Mr. Naftulin that. But, as Mr. Campbell suggests, that is not evidence of the fact. He did not say that here. There is a difference between having told Mr. Naftulin that and what the fact is. I do not know; maybe it is the same.

MR. COAR:—That will be brought out immediately.

THE COURT:—All right; go ahead. I will let him answer.

MR. CAMPBELL:—May the question be read?

THE COURT:—Yes. Read the question.

(Last question read.)

By MR. COAR:

Q. (Continuing) That you told Naftulin that.

A. I did. I didn't use any word 'sock'. I said from the vault."

At page 525a appears the following, which was very prejudicial to defendant's case:

"Q. Your brother had no access to this box, did he?

A. He did not. Might I say, answer your Honor by saying that a lot of other things belonged to other people in that box.

THE COURT:—I would not be surprised.

A. (Continuing) And they are legitimate and clean.

THE COURT:—I did not suggest that they were either legitimate or illegitimate. I just said I would not be surprised. Mr. Crolly's funds seemed to be there, your brother's funds seemed to be there. Maybe there were others; I do not know.

THE WITNESS:—No; they were other people's property, I say."

At pages 529a-534a appears the following, which was very prejudicial to defendant's case:

"By MR. COAR (direct examination of defendant):

Q. Was there any part of the total of these deposits, currency and cash in 1939, totaling $22,992.58, income to you in the year 1939 or earnings by you in the year 1939 or income to you in the year 1938 or income to you in the year 1938?

A. No, sir, except $7, which was interest.

THE COURT:—Of the $22,000 only $7 represented income to you?

THE WITNESS:—Yes, sir.

MR. COAR:—That's on the deposit, your Honor.

THE COURT:—I understand, on the deposit. Now surely, Mr. Memolo, there must be a record of that?

THE WITNESS:—I have said so.

THE COURT:—Where is it?

THE WITNESS:—I beg your pardon, sir.

THE COURT:—Where is the record, the record, the record? There is a record in 1938 showing this?

THE WITNESS:—Yes, sir.

THE COURT:—Where is it?

THE WITNESS:—And the slips that are here indicate it and prove it.

MR. COAR:—It is in evidence, your Honor.

THE COURT:—Mr. Coar, do not trifle with me, please.

MR. COAR:—I am not trifling with the Court.

THE COURT:—I have listened to this man testify now for close to one hour and I have yet to see any record for 1938 or 1939 that came from his office.

MR. COAR:—It has not required any record.

THE COURT:—It has not?

MR. COAR:—It has not required it.

THE COURT:—In my very humble judgment the record would be the best evidence. I have heard of this division of funds of Mr. Decker; I have heard of all these things, but I have seen no record of it and there were substantial funds involved, substantial, $110,000. At least when I compare it to a judge's salary it is some fund.

MR. COAR:—There is no question about that, your Honor.

THE COURT:—Why no.

MR. COAR:—There is no question about that.

THE COURT:—But here he speaks of a number of items involving $22,000 and he boldly says from the stand $7 represents fees. Now if that is true there ought to be a record somewhere.

MR. COAR:—He said there was a record of the $7.52 and the record is here in court under Mr. Naftulin's testimony.

THE COURT:—No, Mr. Coar, I said don't trifle with me. The record ought to be from Mr. Memolo's office, not that which the Government has introduced. The Government has produced it the round-way, the long way. The short way, however, should appear in Mr. Memolo's records, and those I have not seen as yet.

MR. COAR:—If the Court please, may I make this statement?

THE COURT:—Yes, surely.

MR. COAR:—The question here, the testimony of Mr. Memolo, is as to $7. That is already accounted for in Mr. Naftulin's testimony in which he testified that he saw the records in Mr. Memolo's office and from that he deducted from the total of $99.58 the income of $7.

THE COURT:—Now, Mr. Coar, Mr. Naftulin's conclusion and Mr. Memolo's conclusion differ very substantially. Mr. Naftulin determined from his examination of Mr. Memolo's record that the sum of $22,000 or in that sum there was a substantial amount representing income from business. Now Mr. Memolo takes the stand and without producing his own records, says $7 was fees of $22,000. Remember that on that sheet of Mr. Naftulin's there were fifty-eight entries to the sheet. Where is that record?

MR. COAR:—If the Court please——

THE COURT:—I don't know, I am merely asking.

MR. COAR:—This witness——

THE COURT:—I am not giving a riddle. I would like to know where it is. If it does not exist, let the witness say so. If it is here, let the jurors see it. I do not want to see it.

MR. COAR:—If the Court please, the witness has not said there was any record of anything, excepting that transaction, $99.58.

THE COURT:—How does he determine then of the $22,000 sum in question only $7.58, or whatever it is, represents fees?

MR. COAR:—He has testified from his knowledge that is what I can say to you, your Honor. Just as your Honor might state a fact from your own recollection.

THE COURT:—That will be the day and I have a good memory when I can take $22,000 in items and say item for item, $7.00. I merely asked the question, Mr. Coar. I don't care whether he does or does not

produce his records. I merely asked the question. If the records are available, we ought to have them. The defendant has taken the stand. Now, if they are not available, all right. He doesn't know what happened to them. And if he wants to keep them in his office, let him keep them there.

MR. COAR:—If the Court please, what you have said you have assumed that there were records.

THE COURT:—I merely asked. Mr. Memolo said he looked at some records.

MR. COAR:—As to that transaction, yes.

THE COURT:—Mr. Naftulin already testified that he once saw the records. I am not assuming anything. Are there records, Mr. Memolo?

THE WITNESS:—Of what, if your Honor, please.

THE COURT:—Of your business for 1938.

THE WITNESS:—The records of my business for 1938?

THE COURT:—Yes, 1938.

THE WITNESS:—Oh, yes. The business.

THE COURT:—Are they here?

THE WITNESS:—I think that some of them are in my brief case, the adding machine tapes are and they were produced here by the Government and we did not dispute them.

THE COURT:—Your ledger sheets showing these transactions with clients; I would like to see them. Are they here?

THE WITNESS:—The ledger sheets we had the ledger before this Grand Jury for several months.

THE COURT:—No, Mr. Memolo. Mr. Memolo, the 1938 records are they here today?

THE WITNESS:—May I be permitted to answer, if the Court please?

THE COURT:—Yes.

THE WITNESS:—All my business is not kept on the ledger. Some of it is kept in the file of the individual whose business it is.

THE COURT:—Well, are those files here to show how the sums were made up?

THE WITNESS:—The files are not here, because the statement given by Mr. Naftulin is presumed substantially correct and we have not disputed it, but we can get every file if this Court wants them."

At page 535a appears the following:

"Q. In other words, with respect to these amounts of money that were deposited in the safety deposit box, was there any record in the office kept?

A. No, sir, there is no record in the office, because they are in the box. If we couldn't trust the box without asking for a receipt, from somebody we trust, nothing else.

THE COURT:—Now, now. I did not practice law for thirty-six years but in the short time I did practice, I never heard of large funds of anybody, especially the funds not my own, that I did not keep an accurate record of right down to the penny.

THE WITNESS:—May I answer, your Honor?

THE COURT:—I am trying to find out if there are any records on that.

THE WITNESS:—I said there are no records, your Honor, excepting the envelope in which the money was put in the bank in the vault.

THE COURT:—All right, go ahead."

At pages 539a-541a:

"THE COURT:—Mr. Memolo, I have heard you time and time again say 'All this is a matter of record', but where are they?

THE WITNESS:—Well, the Chase National Bank is right here. I did not use a fictitious name.

THE COURT:—It is a matter of record every place but in your office, is that it?

THE WITNESS:—There is no necessity for keeping

a business record that the bank would keep. I did not know of any.

By Mr. Coar:

Q. Now, with respect to the—I am sorry, your Honor.

The Court:—Go ahead.

Mr. Coar:—Are you finished?

The Court:—I had better not say it.

Mr. Coar:—Are you finished?

The Court:—Yes, go ahead.

By Mr. Coar:

Q. With respect to the 1939 income tax return, Mr. Memolo, did you intend, wilfully or knowingly to attempt to defraud the United States Government of any tax due for the year 1939?

A. I did not and I did not account for all of the income for that year, that's true, because I had not used any part of it and I thought that I was justified in not making a return on it, as long as I had not used it. It was in the vault.

The Court:—You have been a member of the bar for thirty-six years and you thought that the income was not taxable until you used it?

The Witness:—In that particular account that is true, because Mr. Decker and myself had not settled our differences.

The Court:—But you had received the funds?

The Witness:—That's correct, and I still say so and I say so after having spoken to a man who is——

The Court:—Well, never mind what you spoke to a man about.

Mr. Campbell:—Just a moment.

The Witness:—I am not an expert on income tax.

The Court:—Well, you would not have to be.

The Witness:—I don't know about that. I know that they have a lot of tricks, these fellows, they are sharp. They know how.

THE COURT:—I have learned a lot of tricks myself but that I won't say where I have learned them. I just wondered where you got the idea that you did not have to report it until you used it.

THE WITNESS:—Well, I have been wrong. I am not here trying to argue. I am giving you my version of it.

THE COURT:—All right."

At page 543a (during cross examination of the defendant):

"MR. COAR:—If the Court please, my objection is that this is not cross examination as to what he testified to before the Grand Jury, not as to the latitude on cross examination.

THE COURT:—There is everything involved in this situation; the credit to be given the testimony of this witness going to the facts in the case. Is his testimony believable at all?

Go on, Mr. Campbell."

At pages 554a-556a:

"Q. Mr. Memolo, as a matter of fact, you not only received the Maloney money but you also received a large part of the fees paid to John Crolly, did you not?

A. I would prefer not to go into the Crolly matter. There's enough tragedy stalking this thing so far, and if you want to——

THE COURT:—Do not become sensitive at this stage of the proceedings. I am directing you to answer the question. It involves your income.

* * * * * * *

Q. Do I understand that Mr. Crolly was indebted to Mr. Greenes?

A. I couldn't tell you that, whether he was indebted or not.

Q. This is the same beer salesman, Mr. Greenes, that you are talking about?

A. That's right.

Q. Whose family necessities required him to borrow a small sum from you to——

MR. COAR:—Just a minute. We object to that, if the Court, please.

MR. CAMPBELL:—Cross examination, if the Court please.

THE COURT:—Yes; I will permit it. This man comes into court without one sheet of paper that represents a record and he calls on us to believe these statements, and I think they should be explored fully. I am going to let the Government counsel do it.

MR. COAR:—I have no objection to the exploration, your Honor. I object to the form of that question; no testimony of that fact. He is assuming that.

THE COURT:—The sole testimony, Mr. Coar, is that in this short period of time this beer salesman whom he threw out of his office in 1943 he lent $34,000 to.

MR. COAR:—There is no question about that. That is not what I am objecting to, your Honor.

THE COURT:—The same beer salesman, according to his testimony, who got somewhere between fourteen and seventeen thousand dollars. Just like that. $1,000 just floats around here like pennies. Go right ahead, Mr. Campbell. I will overrule your objection. You may have an exception.

(Which exception is hereby allowed and sealed accordingly.)"

At pages 574a-575a:

"Q. (Continuing) That Mr. Decker received any of these fees?

A. Well, I don't know that I said Mr. Decker individually. I don't think I said Mr. Decker in-

dividually until some time later. But I said that I had to pay out on those fees.

Q. On the $80,000, sir?

A. On all fees that I got; whatever they were.

Q. Let us take these Bethlehem fees. You say they were——

A. I'm talking about Bethlehem fees.

MR. COAR:—Won't you be good enough to let him answer the question?

THE COURT:—He does not answer the question. He answers everything but the questions. The question was simple: 'When did you first tell the agents that Mr. Decker got part of your fees?' That is the question. That has led to this long story.

MR. COAR:—That is what I would like to have answered.

THE COURT:—Mr. Decker is now dead.

MR. COAR:—That is what I would like to have answered, your Honor, if we can get it in the record.

THE COURT:—I want him to tell us. What year? What year? We have quibbled here with this thing all afternoon. I want to know what year? That was the question.

THE WITNESS:—I can't tell you the year. I don't remember the year."

At pages 614a-615a:

"THE COURT:—We have had eight character witnesses and eight are more than adequate.

MR. COAR:—I desire to state on the record, if the Court please, that the defendant desires to offer testimony of two additional witnesses as to the reputation of the defendant, John Memolo: David J. Reedy and——

THE COURT:—Mr. Coar, you are saying that only to impress the jurors.

MR. COAR:—I am not saying that to impress the jurors.

THE COURT:—What difference does it make who they are?

MR. COAR:—It does not make any difference excepting I am making an offer of proof and I have to state the persons.

THE COURT:—I have sustained the objection of the Government already. You are stating, for the purposes of the record, two additional witnesses.

MR. COAR:—That is right, your Honor.

THE COURT:—If you are not trying to impress the jurors, you are surely not impressing me because I do not care who they are. I mean the names. Names do not impress me. You are offering two additional witnesses. I stopped it at eight because yesterday afternoon I told you eight would be the limit and eight is the limit.

MR. COAR:—Your Honor, I do not recall your statement to that effect.

THE COURT:—That is my recollection of it, Mr. Coar, and that it shall remain. I have ruled in this case. Let us go on."

At pages 620a-621a (During cross examination of Mr. Naftulin):

"Q. My question, Mr. Naftulin, is what was the tax paid by Mr. Memolo for the year 1938?

THE COURT:—He just told you.

MR. COAR:—That is on the original return, your Honor. We have in evidence the supplemental returns.

THE COURT:—You have not asked him.

MR. COAR:—My question, your Honor, was what was the tax that Mr. Memolo paid for the year 1938. That would include the——

THE COURT:—Let us not try to deceive the jurors about it.

MR. COAR:—I am not trying to deceive anybody, your Honor.

My question was: 'Do you know what tax Mr. Memolo paid for the year 1938?' I did not limit that either to one or the other. That is the tax he paid.

THE COURT:—I know.

MR. CAMPBELL:—In view of that statement, I object to the question as immaterial, if the Court please.

THE COURT:—Yes; I sustain the objection to the question and the manner in which it is framed."

At page 623a, after counsel for both the Government and defendant had indicated they had completed their examination of the witness Naftulin, the Trial Judge took over the examination and proceeded to ask him a number of questions as to when the 1939 supplemental return was filed by the defendant, emphasizing the fact that it was five years after the original return, and after the witness's investigation had begun; and further at pages 623a-624a, asking the witness Naftulin the following question:

"THE COURT:—Oh, incidentally, Mr. Naftulin, did you see any books or records yesterday when you sat with this accountant?

THE WITNESS:—No, sir."

At pages 624a-625a:

"By MR. COAR:

Q. Did the computations to which you have testified here today require any records, do you know?

THE COURT:—It is not a question of requirement. I am just curious, Mr. Coar. I am just wondering whether or not he saw them, if he did. We have not seen them. I wondered if he did.

MR. COAR:—I wanted to know if the question was raised that there were any records kept from this witness yesterday.

THE COURT:—I simply asked if you saw anything?

MR. CAMPBELL:—I think it is obvious the computations were made on Mr. Coar's figures.

MR. COAR:—They were not on the assumption of Mr. Renard but on the assumption of the figures that Mr. Naftulin had previously offered in evidence here.

THE COURT:—Which were eliminated.

MR. COAR:——with the deduction——

THE COURT:—These computations, as I understand them, were made entirely on hypothetical questions propounded by Mr. Coar in substantially the same force as they were propounded here today, is that right?

THE WITNESS:—Yes, sir.

THE COURT:—And that did not require any records because Mr. Coar furnished the figures.

THE WITNESS:—Yes, sir.

MR. COAR:—Your Honor——

THE COURT:—Or his accountant.

THE WITNESS:—His accountant."

At pages 650a-651a:

"By MR. COAR:

Q. Mr. Greenes, in the year 1933, just that year alone, did you get any money from Mr. Memolo?

THE COURT:—Objection sustained.

MR. COAR:—I did not hear any objection.

THE COURT:—I have made it. I have sustained it. You may have an exception.

(Which exception is hereby allowed and sealed accordingly.

(Sealed).....U. S. D. J.)

THE COURT:—I am insisting that you be specific.

If you are not specific, we will be here much longer than the case should take. You called to his attention a loan or an advance of $10,000. If you have others in mind, be specific about them. I think, as the witness suggests, it is ten years ago."

At pages 652a-654a:

"MR. COAR:—If the Court please, I ask your Honor's permission to cross examine this witness year and year and ask him if during each of these years he received any money from Mr. Memolo.

MR. CAMPBELL:—I make the objection which I have heretofore made.

THE COURT:—I will let him answer.

By THE COURT:

Q. Do you recall whether or not you received any loan in 1934? With this instruction to the witness: If you cannot recall as to the year, you may say so. I will not compel you to testify falsely.

MR. COAR:—Just a minute, if the Court please. I object to that statement.

THE COURT:—I am talking to the witness, not to you, you let me finish.

MR. COAR:—I will. Then may I say something?

THE COURT:—These are instructions to the witness. You are under no compulsion to testify except as to the truth. If you do not recall, you are to say so and if you do recall you are to say that you do recall and testify accordingly.

Go on year by year.

MR. COAR:—If the Court please, may I have an objection on the record to your Honor's statement in the presence of this jury, the information that it is an attempt to have the witness testify to something that is false.

THE COURT:—What is your application, Mr. Coar?

MR. COAR:—My objection is to your Honor's re-

mark in the presence of this jury, and I now ask that a juror be withdrawn and this case continued.

THE COURT:—What?

MR. COAR:—And this case continued.

THE COURT:—The application is denied.

MR. COAR:—May we have an exception?

THE COURT:—You may have an exception.

(Which exception is hereby signed and sealed accordingly.

(Sealed).....U. S. D. J.)

THE COURT:—The jurors are instructed that no influence from the Court's instructions to the witness is to be gathered. Those were instructions only to the witness so that the witness might be guided in his testimony. You are not to infer that there is any suggestion at all that anyone is telling him to testify falsely."

At pages 655a-656a (During cross examination of Jacob Greenes):

"Q. You do not recall whether you received any money in 1934?

THE COURT:—He says he does not recall and the answer is adequate. I suggest to you again, Mr. Coar, that the only way to get the information is to be specific here. If Mr. Memolo has records of any such loans or anything of the like, it should not be difficult to be specific.

MR. COAR:—If the Court please, may I without reference to what records the defendant may have or may not have, cross examine this witness as to his knowledge?

THE COURT:—He said he does not recall, and I suggest that the answer is adequate. We cannot permit a witness to be browbeaten unnecessarily until you get an answer that you want.

MR. COAR:—If the Court please, I again take exception to your Honor's remark, 'browbeating' the witness.

THE COURT:—You may have an exception, Mr. Coar. Let us go on."

It is respectfully submitted that the caustic remarks and acid comment of the trial judge, manifested by these excerpts from the testimony, were sufficient to prejudice any jury, and they are not in accordance with the dignity with which a trial should be conducted.

Sorrentino v. Graziano et al., 341 Pa. 113 (1941).

In this case a judgment in a jury case was reversed, and a new trial ordered because of prejudicial remarks made by the trial judge, as well as his severe interrogation of one of the defendants' witnesses. At page 119, the Supreme Court of Pennsylvania quotes as follows from one of its earlier decisions:

"'* * * 'The practice of a judge entering into the trial of a case as an advocate is emphatically disapproved. The judge occupies an exalted and dignified position; he is the one person to whom the jury, with rare exceptions, looks for guidance, and from whom the litigants expect absolute impartiality. An expression indicative of favor or condemnation is quickly reflected in the jury box and at the counsel table. To depart from the clear line of duty through questions, expressions or conduct, contravenes the orderly administration of justice. It has a tendency to take from one of the parties the right to a fair and impartial trial, as guaranteed under our system of jurisprudence. Judges should refrain from extended examination of witnesses; they should not, during the trial, indicate an opinion on the merits, a doubt as to the witnesses's credibility, or do anything to indicate a leaning to one side or the other, without explaining to the jury that all these matters are for them'."

It is respectfully submited that a new trial should be awarded because of the very prejudicial remarks of the trial judge in this case in the presence of the jury. Since the investigations of Judge Johnson was already notorious, it is particularly important that those supposed to be connected with it be not unduly prejudiced.

3. It was error to refuse to permit reference to the stenographic report which Government witness Wade required to refresh his recollection.

The record clearly indicates that long before this prosecution had begun the Government acquired all the information it needed by examination of the Petitioner, as well as many of the other witnesses. Petitioner's books were seized and kept for eight months until ten days before the trial.

In the course of the Johnson investigation, the Petitioner was summoned to appear at the United States Attorney's office in New York City, and was examined. These Notes of Testimony (Exhibit G 41) were read in evidence, beginning at page 165a.

Another method of investigation employed by the prosecution was by means of the efforts of Mr. Wade who is a special agent for the Department of Revenue in charge

of fraud cases. Mr. Wade summoned the Petitioner to his office on November 6, 1941, and the ensuing examination was taken down stenographically. At the trial of the case, Mr. Wade took the stand and testified at some length as to the information he secured at that time, three and one-half years earlier. The cross examination of Mr. Wade begins at page 359a. There Mr. Wade stated that his examination of the Petitioner was taken down stenographically, and counsel for your Petitioner asked to see the notes. Mr. Wade produced the papers, but the court interrupted, and the following took place:

> "THE COURT:—Just a moment. Is it your intention to offer this?
>
> MR. COAR:—I do not know, your Honor. I would like to see it first.
>
> THE COURT:—That is not your privilege, unfortunately. The witness has not used it. The witness has not used it, Mr. Coar."

and at page 360a:

> "THE COURT:—The witness does not have to object, for that matter. I am fully aware of the protection placed around these files as a matter of law. If you have some information that this testimony differs from something that was said by Mr. Memolo and you think his report will disclose it and you wish to offer it, I am willing to let you have it because I think that justice then demands that you have it. But just to permit you to read it, especially since the witness has not used it; nothing could make this report evidential, you see."

Thereafter, the cross examination continued, and the following appears (361a-362a):

> "By MR. COAR:
>
> Q. Mr. Wade, before you went on the stand here today you have referred to that transcript of the dis-

cussion between you and Mr. Memolo held on November 6, 1941, have you not?

MR. CAMPBELL:—Objected to as immaterial.

THE COURT:—No; I will let him answer it.

A. I have referred to that many times, Mr. Coar.

Q. For the purpose of refreshing your recollection, have you not?

A. Yes, sir.

Q. And for the purpose of refreshing your recollection to enable you to testify in this case?

A. I have referred to it for various reasons, Mr. Coar, over a period of several years.

Q. And recently before you went on the stand you referred to it, did you not?

A. I didn't refer to it today. I referred to it recently; yes.

Q. Yesterday?

A. No, I don't believe I looked at it yesterday."

Thereafter, the request to see the transcript was repeated, and permission refused by the court.

It is clear that Mr. Wade was not relying on his recollection of the conversations of November 6, 1941, when he testified in May, 1945. He had consulted his notes many times. Since it was the defendant's contention that he did not know his income tax liability and had repeatedly asked the revenue agent to tell him what it was and had paid it when he found out what it was, it seems to the Petitioner important to find out whether three and one-half years before the trial anything of this sort had occurred, according to the transcript of the conversations held in the meantime, in the Government's own file. The case was no different than if the witness had held the notes of testimony in his hand and made reference to them. He had examined them many times in the interim, and only recently before trial again examined

them. It is too clear for argument that the witness was not testifying to the recollection of the occurrence, but to his recollection of what the notes of testimony reported. The case is like that of

Morris v. United States, 149 Fed. 123 (1907), C. C. A. 5, at 126.

Here, the court states:

> "The accused in a criminal case in the courts of the United States has a right to be confronted by the witnesses against him, and through and by his counsel given an opportunity to be informed and advised of all the evidence that is submitted against him. To permit the district attorney to furnish a paper to a witness, and allow the witness to testify from and by that paper, without having previously exhibited it to the defendant on his demand, is practically to deny him the right of being confronted with the witnesses against him, and tends to deprive him of full opportunities to defend himself. We understand it to be the universal rule of evidence in the courts of this country that, where a witness is permitted to examine and refresh his recollection with a paper, it is to be tendered to the other side, for inspection just as soon as it has been identified. This rule is found in all the textbooks, and, if numerous adjudged cases declaring it are not found on all hands, it is because of the absence of *nisi prius* reports, and because so few trial courts have ever denied the right in question."

It is respectfully submitted that the correct rule of law is recited in the Morris case. The action of the trial judge in this respect was assigned for error, and the action of the Court of Appeals for the Third Circuit in affirming the judgment below is in conflict with the foregoing decision of the Fifth Circuit.

CONCLUSION.

An examination of the record will show that the Government investigated this case, at least as early as 1941, and had no difficulty in getting all the information it desired. It has all the tax to which it is entitled. In one respect only did it fail. The prosecution was not able to get Mr. Memolo to testify that any of the funds he had received went to Judge Johnson or were intended for Judge Johnson. Two days before the period of the Statute of Limitations expired, an indictment was found. It was impounded until after the statute of limitations had run, and then was quickly brought to trial. It was called only once, and it was tried that day and on the succeeding days.

While the record shows a motion for continuance was filed the day of the trial, there was nothing unexpected by the motion because in opposition to it the prosecution filed an affidavit dated the preceding day (25a).

The Petitioner's books and records, taken from him without his consent in September, 1944, were returned only after an order of court entered to that effect, and he received them on May 4 and May 5, 1945, with the trial starting on May 15.

With this introduction, there followed the extraordinary procedure of this case. First, the judge excused a number of jurors who did not ask to be excused. The judge who tried the case is from Newark, New Jersey. He is not a local resident of this district. He could not have known these jurors of his own knowledge. He must have acquired some information to form a basis for dismissing some of them, without request.

The experience of most trial judges, as witnessed from the position of counsel, is one of difficulty in secur-

ing sufficient jurors, particularly in times of labor shortage. Many jurors do not like to serve, and try to present excuses. The effort of the court is to resist these excuses. It is most unusual for the court, on its own motion, to dismiss almost one-third of the panel largely without request, and then to decline to give any reason whatever for this action. It is all the more remarkable when it is noted there were not sufficient jurors left in the panel to afford the parties the number of challenges authorized by statute.

It is respectfully submitted that these facts are sure indication that the court was informed from some source of reasons why these jurors might be undesirable. Those reasons were not supplied by the defense. The only circumstance not appearing of record is the number of those discharged. This is of record in the clerk's office, and Petitioner offers to prove it. These circumstances were not an auspicious opening in a forum required to administer a trial fairly.

An examination of the record thereafter will show that time and again the court ridiculed the defense, made caustic remarks, and otherwise expressed the court's opinion about the dubious nature of the defense. When it is borne in mind that this occurred in a case already widely publicized, it can be readily understood that the jury could not help but be prejudiced.

There are many errors in the course of the trial which have been made the subject of assignments of error, but are not available as reasons for granting this certiorari. It is submitted, however, that the general unfairness of the trial is a denial of the constitutional rights of the Petitioner.

It is further submitted that the refusal to require the Government witness, Wade, to produce the notes of testi-

mony, taken three and one-half years before was error, which is not in accord with the law generally, and is in conflict with the rule laid down in the Fifth Circuit in the Morris case.

It is, therefore, respectfully submitted that it is appropriate for this Court to grant the Petition for Certiorari prayed for.

Respectfully submitted,

ROBERT T. MCCRACKEN,
STANLEY F. COAR,
C. RUSSELL PHILLIPS,
Attorneys for Petitioner.